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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re STAN BARRY NEWTON, on Habeas Corpus.	H033761 (Santa Clara County Super. Ct. No. CC642535)

I. STATEMENT OF THE CASE

Petitioner Stan Barry Newton was charged with reckless evasion of a peace officer (Count 1), drunk driving (Count 2), and driving with a blood alcohol level of .08 percent or more (Count 3). (Veh. Code, §§ 2800.2, subd. (a), 23103, 23152, subd. (a), & 23152, subd. (b).) The amended complaint also alleged that Newton had two prior felony convictions that qualified as strikes under the "Three Strikes" law. (Pen. Code, §§ 667, subds. (b)-(i); 1170.12.)[1] Prior to trial, Newton pleaded no contest to Counts 1 and 3 with the understanding that he faced a mandatory Three Strikes sentence of 25 years to life, he could make a *Romero*[2] request to dismiss his strikes and thereby reduce the length of his sentence; and Count 2 would be dismissed. At sentencing, the court denied Newton's *Romero* request and imposed the mandatory sentence of 25 years to life.

In his petition for a writ of habeas corpus, Newton alleges that trial counsel rendered ineffective assistance in advising him to admit one of the strike allegations. We

[1] All further unspecified statutory references are to the Penal Code.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)

requested an informal response from the Attorney General. (Cal. Rules of Court, rule 8.385(b) &(c); see *People v. Romero* (1994) 8 Cal.4th 728, 741-742.)

We conclude that Newton has made a prima facie showing that he is entitled to relief and issue an order to show cause as to why relief should not be granted.[3]

II. BACKGROUND

Current Offenses

The probation report reveals that on July 8, 2006, a deputy sheriff initiated a traffic stop after observing Newton cross over double solid yellow lines into oncoming traffic. Newton failed to stop and led the deputy on a high speed chase through city streets and onto the freeway. As he left the freeway, Newton crashed his car. He was later arrested, and at the time, his blood alcohol level was .20 percent.

The Strike Offenses

On June 30, 1988, Newton crashed his car into a signal pole. He had four passengers at the time. One was killed, and the others were injured. Newton's blood alcohol level had been .12 percent. Newton pleaded guilty to (1) vehicular manslaughter and (2) driving with a blood alcohol content over the legal limit, committing an unlawful act or omission, and causing bodily injury.[4] He was placed on probation. Probation was later revoked, and he was sentenced to two years in prison.

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[3] Newton also appealed from the judgment (H032219, *People v. Newton*) claiming the trial court abused its discretion in denying his *Romero* request, and we ordered that the appeal and petition would be considered together.

In a separate opinion, we reject Newton's claim on appeal and affirm the judgment.

In this proceeding, we grant the Attorney General's request that we take judicial notice of the record in *People v. Newton* (H032219), which Newton cites in his brief. (Evid.Code, §§ 452, subd. (d)(1), 433, 459.)

[4] Newton pleaded guilty to a charge that he violated section 192, subdivision (c)(3), in that he killed a person while driving in violation of Vehicle Code section 23153, violating the basic speed law (Veh. Code, § 22350), and committing a lawful act which might produce death in an unlawful manner. At that time, section

III. THE PETITION

Newton's claim of ineffective assistance focuses on the allegation that his prior conviction for vehicular manslaughter qualified as a strike and on counsel's advice to admit it. Newton notes that under the Three Strikes law, that conviction constitutes a strike only if it "involve[d] the personal infliction of great bodily injury on any person *other than an accomplice* . . . ." (§ 1192.8, subd. (a), italics added; see §§ 667, subd. (d)(1) & (2), 1170.12, subd. (b)(1) & (2); 1192.7, subd. (c).) According to Newton, the record of that conviction does not establish that the manslaughter victim was a person "other than an accomplice . . . ." (§ 1192.8, subd. (a).) Thus, Newton argues that given the lack of evidence to establish a strike, competent counsel would not have advised him to admit the strike allegation and would instead have contested it and made the prosecutor prove it.

In support of his claim, Newton submits the complaint on the strike offenses and the minute order of his plea. The former does not include allegations that the victim was not an accomplice or that the offense constituted a serious felony or strike; and the latter indicates that Newton pleaded only to the charge.

Newton also submits the probation report prepared in connection with his strike convictions. The report summarizes the statement of Leonard Perrault, one of the passengers injured in the incident, who "[felt] very strongly that the deceased person contributed to the accident by how he was behaving while in the automobile. [Perrault] cannot say that he saw [the decedent] actually grab the steering wheel from Mr. Newton,

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secton 192, subdivision (c)(3) defined vehicular manslaughter as "Driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but with gross negligence ; or driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence." (See Stats. 1986, ch. 1106, §3, p. 3882.) That section was later revised and the language quoted above deleted. (See Stats. 2006, ch. 91, § 2.)

but does describe him as being extremely drunk and extremely out of control, angry and acting in a very wild manner."

Perrault explained that that evening, the decedent had to be removed from a few bars for being belligerent with other customers. Perrault regretted allowing the decedent to sit in the front passenger seat because he refused to sit still and was out of control. He reported that the decedent had talked about a new insurance policy that would benefit his wife if he should die, and he opined that the decedent was " 'looking for death' " and "had decided to take them all with him."[5]

Last, Newton submits his own declaration as well as declarations from Allan Speare, his trial counsel, and Allen Schwartz, an attorney who has previously testified as an expert on ineffective assistance of counsel.

In his declaration, Newton states that before he pleaded no contest, trial counsel advised him that the best course of action was to enter the plea and seek dismissal of the strikes in a *Romero* hearing. Trial counsel did not discuss any factual or legal defenses to the strike allegations. In reliance on trial counsel's advice, he entered his plea and admitted the strike allegations. At that time, however, he did not know the factual requirements that render a conviction for vehicular manslaughter a strike, and he did not learn about those requirements until he was later advised by his appellate attorney. He states that had he known there was a strong defense to the strike allegation, which, if successful, would have substantially reduced his potential punishment, he would not have admitted the strike allegation as part of the plea bargain.

In his declaration, trial counsel states that the initial charges against Newton did not include strike allegations, and Newton was offered a deal involving a 16-month prison term. Newton did not immediately accept the offer, and before he could do so, the

[5] Newton also submits the transcript of his probation revocation hearing in 1994, at which Mr. Perrault apparently testified that in his recollection of the incident, the decedent grabbed the steering wheel.

prosecutor added an additional count and the strike allegations. Counsel consulted some other attorneys about the best strategy, and none suggested that vehicular manslaughter did not qualify as a strike. Ultimately, he concluded that it was best for Newton to enter an early plea with a *Romero* request and so advised him, noting that the request would be heard by Judge Rice, who "had a good reputation amongst the criminal defense bar," but that if he did not settle, the case might be heard by "a less favorable judge." He did not believe there was any basis to challenge the strike allegation.

Trial counsel further stated that neither the prosecutor nor the probation department indicated to him that there was any problem with the strike allegation, and the trial court found that this was a Three Strikes case. Counsel averred that had he known at the time there was a possible defense to the strike allegation, he might have withdrawn as Newton's attorney and might have made the *Romero* request.

Mr. Schwartz was retained by Newton's appellate counsel to review the pertinent records. In his declaration, he states that the record of Newton's strike convictions contained no evidence with which the prosecution could prove beyond a reasonable doubt that the decedent was *not* an accomplice to the strike offense. And, absent such proof, Newton's conviction for vehicular manslaughter would not qualify as a strike. Mr. Schwartz noted that the underlying complaint did not allege that the victim was not an accomplice, and there is no evidence that Newton admitted that fact when he pleaded guilty to vehicular manslaughter. Moreover, the record indicated to him that the decedent was an accomplice.

Mr. Schwartz further notes that a defense attorney has a duty to investigate all factual and legal defenses and confer with the client before permitting the client to abandon them and enter a plea. He opines that given the record of conviction, competent counsel would have contested the strike allegation and not advised Newton to admit it. This is especially so because Newton faced a substantially longer sentence with two strikes than he would face with only one. Moreover, Mr. Schwartz could conceive of no

tactical reason not to challenge the strike allegation. He opined that losing the benefit of the plea bargain was not a good reason because the agreement was not a "meaningful" bargain. Although Count 2 (drunk driving) would be dismissed, that count charged a misdemeanor and was merely an alternative to Count 3 (driving with a .08 percent blood alcohol level) which was added in the amended complaint and which Newton admitted as part of the bargain. The only substantive term of the bargain was that Newton could make a *Romero* request at sentencing. However, Mr. Schwartz observes, "In Santa Clara County . . . , there is no distinction made between a *Romero* motion brought after an early plea, and a *Romero* motion brought following an arguable but unsuccessful challenge to the sufficiency of one or more strike priors. It would be improper for any court to penalize a defendant for making such a challenge, and, in my experience in this county, this is not done." Moreover, if defense counsel had contested the strike allegation, then, even if that challenge had failed and the court later denied a *Romero* request, counsel would have preserved for appeal a claim that there was insufficient evidence to establish the strike.

Last, after reviewing trial counsel's declaration, Mr. Schwartz opined that nothing counsel said justified his advice to Newton and failure to contest the strike allegation. According to Mr. Schwartz, the fact that other attorneys, the prosecutor, or the court failed to alert him to a possible factual and legal defense to the strike allegation does not excuse or otherwise render reasonable his own failure to investigate, discover, and present it.

IV. COGNIZABILITY OF NEWTON'S CLAIM

Initially, we address the Attorney General's arguments that Newton's ineffective assistance claim is not cognizable through habeas review. He notes that this claim constitutes an attack on the validity of the plea and thus would have required Newton to obtain a certificate of probable cause if he had wanted to raise it on appeal. (See § 1237.5 [appeal challenging validity of plea barred in absence of certificate of probable cause];

People v. Mendez (1999) 19 Cal.4th 1084, 1094 [certificate required].)[6] Since Newton did not obtain a certificate, the Attorney General argues that Newton cannot now invoke habeas corpus review to circumvent the certificate requirement.

In *In re Chavez* (2003) 30 Cal.4th 643 (*Chavez*), the California Supreme Court stated that "a defendant who has filed a motion to withdraw a guilty plea that has been denied by the trial court still must secure a certificate of probable cause in order to challenge on appeal the validity of the guilty plea. [Citations.] A defendant who challenges the validity of such a plea on the ground that trial counsel rendered ineffective assistance in advice regarding the plea may not circumvent the requirements of section 1237.5 by seeking a writ of habeas corpus. [Citations.]" (*Id*. at p. 651, citing *In re Brown* (1973) 9 Cal.3d 679 (*Brown*).)

In *Brown, supra*, 9 Cal.3d 679, the defendant moved to withdraw her plea on the grounds of ineffective assistance, the motion was denied, and she then requested a certificate of probable cause to challenge that ruling. When the request was denied, the defendant sought habeas relief, reiterating her claim of ineffective assistance. (*Id*. at pp. 680-682.) The California Supreme Court denied the petition because her ineffective assistance claim was cognizable on appeal, and she failed to obtain a certificate of probable cause to appeal. (*Id*. at pp. 682-683.) Describing the petition as "nothing more than an alternative appeal," the Supreme Court determined that she could not circumvent the certificate of probable cause requirement by passing off her claim as a petition for

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[6] Section 1237.5 states, "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

writ of habeas corpus. (*Id*. at p. 683; see and *People v. Ribero* (1971) 4 Cal.3d 55, 62-63 [certificate required for appellate challenge to the denial of a motion to withdraw plea].)

Although the general statement in *Chavez* and the analysis in *Brown* might appear to foreclose consideration of Newton's claim through habeas review, we conclude that they do not.

" 'Competency of counsel issues usually involve factual questions which are more appropriately raised in a petition for writ of habeas corpus. Such claims are cognizable on appeal *where there is an adequate record for review*.' [Citation.]" (*People v. Gonzalez* (1993) 13 Cal.App.4th 707, 718, italics in *Gonzalez*, quoting *People v. Everett* (1986) 186 Cal.App.3d 274, 279, disapproved on other grounds in *People v. Mendez, supra*, 19 Cal.4th at pp. 1097-1098, fns. 7-9.)

Where, as in *Chavez* and *Brown*, a defendant moves to withdraw his or her guilty plea on the ground of ineffective assistance of counsel, the proceedings on that motion will ordinarily require defense counsel to explain why he or she acted or failed to act, and, therefore, there will be an adequate record to review such a claim on appeal. Under such circumstances, the defendant should be required to raise the claim on appeal and obtain a certificate of probable cause to do so; conversely, allowing the defendant to seek review of the claim in a habeas proceeding would, indeed, circumvent the certificate requirement.

However, in *People v. Wilson* (1992) 3 Cal.4th 926, the court explained, "Our past decisions establish, with regard to ineffective-assistance-of-counsel claims, that '[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected. [Citations.] . . . [B]ecause, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the

attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct. 'Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence.' [Citation.] . . . '[T]o promote judicial economy in direct appeals where the record contains no explanation, appellate counsel who wish to raise the issue of inadequate trial representation should join a verified petition for writ of habeas corpus.' [Citation.]." (*Id.* at p. 936; see *People v. Ledesma* (2006) 39 Cal.4th 641, 734 [where record does not reveal reasons for counsel's actions, claims of ineffective assistance should be reviewed in habeas proceeding].)

Such was the case in *People v. Mendoza Tello* (1997) 15 Cal.4th 264. There, the Supreme Court had only the defendant's unverified claims of inadequacy of counsel and corruption, which were insufficient by themselves to reverse a prima facie validly entered judgment. Moreover, the limited record on appeal made it impossible to determine the adequacy of defense counsel's investigation or whether defense counsel made material misrepresentations or otherwise acted inappropriately in the entry of the guilty plea. Further, although the defendant believed that he was somehow coerced into pleading guilty, the appellate record did not support his belief. Under the circumstances, the Supreme Court stated, "Because claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal [citations] would not bar an ineffective assistance claim on habeas corpus. (*Id.* at p. 267.)

A similar exception was applied in *In re Bower* (1985) 38 Cal.3d 865, where the defendant sought habeas relief based on a claim of prosecutorial vindictiveness. Before reaching the merits, the Supreme Court addressed the Attorney General's argument that because the defendant's claim was cognizable on appeal from the judgment but was not

raised at that time, it was not reviewable in a habeas proceeding. In rejecting this argument, the court acknowledged that "habeas corpus generally may not be used as a second appeal and that matters that could have been, but were not, raised on appeal are not cognizable on habeas corpus in the absence of special circumstances warranting departure from that rule. [Citations.] It is equally well established, however, that when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but required. [Citations.]" (*Id.* at p. 872.) The court further indicated that when a claim of prosecutorial vindictiveness is made, the parties will not be denied the opportunity to present evidence outside the record on that issue. Accordingly, the habeas petition was the appropriate vehicle for review. (*Ibid.*)

Here, Newton did not bring a motion to withdraw his plea based on ineffective assistance, and the record on appeal does not show that defense counsel was asked to explain the reasons why he advised Newton to admit the strike allegations. Moreover, because Newton's claim of ineffective assistance is based on matters outside the record on appeal, a request for a certificate of probable cause inevitably would have been denied because there was no factual basis for it. For the same reason, a petition for a writ of mandate based on the improper denial of a request would have been futile.

Under the circumstances, appellate counsel had no real choice but to forego a claim of ineffective assistance on appeal and raise it in a petition for habeas relief. That petition cannot reasonably be viewed as a second appeal or an attempt to circumvent the certificate requirement. Thus, we conclude that the failure to obtain a certificate does not bar review of his claim in this proceeding.

In a single sentence, the Attorney General alternatively argues that insofar as Newton claims the record does not support a finding that his prior conviction qualifies as a strike, the claim is not cognizable on habeas review because the sufficiency of evidence can be, and could have been, raised on appeal. We reject this argument for two reasons.

First, Newton could not have raised that claim on appeal because an admission of the strike allegation establishes that there is sufficient evidence to support it. (See *People v. Moore* (2003) 105 Cal.App.4th 94, 99 [plea bars appellate claim concerning sufficiency of evidence]; *People v. Turner* (1985) 171 Cal.App.3d 116, 125 [plea admits sufficiency of evidence]; e.g., *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785, [admitting enhancement allegation bars claims of insufficient evidence].) Second, Newton does not seek habeas relief or otherwise challenge the strike on the ground of insufficient evidence.

We now proceed to the merits of Newton's claim of ineffective assistance.

V. HABEAS RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A criminal defendant has a right under the federal and California Constitutions to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Hill v. Lockhart* (1985) 474 U.S. 52, 57; *In re Alvernaz* (1992) 2 Cal.4th 924, 933-934; *People v. Pope* (1979) 23 Cal.3d 412, 422.) That right applies during the plea bargaining and pleading stages of the criminal process, and, therefore, " 'where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.' [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239, fn. omitted, quoting *In re Alvernaz*, *supra*, 2 Cal.4th at p. 934.)

To be entitled to a writ, or to an order to show cause, a petitioner must establish a prima facie case for relief in his habeas corpus petition. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) Thus, to obtain such relief based on ineffective assistance, a petitioner must make a prima facie showing "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz*, *supra*, 25 Cal.4th at p. 239.) To show prejudice

in the context of a challenge to an accepted plea bargain, the defendant must show a reasonable probability that but for counsel's deficient assistance, he "would not have pleaded guilty and would have insisted on proceeding to trial. [Citation.]" (*In re Alvernaz, supra*, 2 Cal.4th at p. 934; *Hill v. Lockhart, supra*, 474 U.S. at p. 59; *In re Resendiz, supra,* 25 Cal.4th at p. 253.)

It is settled that effective and competent representation requires "counsel's 'diligence and active participation in the full and effective preparation of his client's case.' [Citation.] Criminal defense attorneys have a ' "duty to investigate carefully all defenses of fact and of law that may be available to the defendant . . . ." ' [Citation.] . . . [Citation.] 'Counsel should promptly advise his client of his rights and take all actions necessary to preserve them . . . .' " (*People v. Pope, supra,* 23 Cal.3d at pp. 424-425.)

"With respect to counsel's duties in the entry of a guilty plea, ' "[i]t is his [counsel's] task to investigate carefully all defenses of fact and of law that may be available to the defendant and confer with him about them before he permits his client to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty." ' [Citations.] Counsel 'is expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.' [Citation.]" (*People v. McCary* (1985) 166 Cal.App.3d 1, 8.)

Prima Facie Showing of Deficient Performance

In this case, simple and basic legal research quickly would have revealed that (1) Newton's conviction for vehicular manslaughter would qualify as a strike only if it involved the personal infliction of great bodily injury on a person "other than an accomplice" (§ 1192.8, subd. (a); *People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1690-1691; see §§ 667, subd. (d)(1) & (2), 1170.12, subd. (b)(1) & (2); 1192.7, subd. (c)); and

(2) the prosecution had the burden to prove that fact beyond a reasonable doubt (*People v. Towers* (2007) 150 Cal.App.4th 1273, 1277; *People v. Henley* (1999) 72 Cal.App.4th 555, 558-567; *People v. Houck* (1998) 66 Cal.App.4th 350; *People v. Haney* (1994) 26 Cal.App.4th 472, 475).

Moreover, a review of the documents comprising the record of that conviction would have revealed only that Newton was the driver and the victim one of a number of passengers in the car at the time it crashed. There was no other evidence suggesting that the victim was *not* an accomplice, let alone substantial and admissible evidence sufficient to prove that fact beyond a reasonable doubt. (E.g., *People v. Henley, supra,* 72 Cal.App.4th at pp. 561-562 [for purposes determining whether offense was a strike, evidence that injured person was a passenger on defendant's motorcycle not enough to prove that passenger was *not* an accomplice]; cf. *People v. Cortez* (1999) 73 Cal.App.4th 276, 280 [where the record does not disclose the facts pertaining to the prior conviction of shooting from a motor vehicle, and it could have been committed without defendant personally using a firearm, defendant's conviction for it was insufficient proof that he personally used a firearm].)

Under the circumstances, reasonably competent counsel would have considered it difficult for the prosecutor to prove that the conviction was a strike and, therefore, known that Newton had an arguable, if not strong, defense to the strike allegation. This is especially so given Perrault's extra-judicial statements summarized in the probation report, which suggest that the victim may indeed have aided and abetted Newton's drunk and reckless driving. Although those statements appear to be inadmissible hearsay (Evid. Code, § 1200), they provide additional reason to believe that the prosecution could not satisfy its burden of proof.

Next, reasonably competent counsel would have realized that Newton had a compelling reason to contest the strike: if only one strike allegation were found true, Newton would face a prison term substantially shorter than the mandatory 25-to-life

sentence he would face with two strikes. Finally, it would have been obvious to reasonably competent counsel that the potential benefit to be gained by successfully contesting the strike allegation outweighed the risk of losing the plea bargain and going to trial on the underlying offenses and strike allegations. As Mr. Schwartz correctly observed, the net benefit from the plea bargain—dismissal of misdemeanor charges in Count 2 and the right to make a *Romero* request at sentencing—was minimal, if not somewhat illusory. If after a trial, Newton were convicted of all three counts and both strike allegations were found true, he would not have faced a materially greater sentence than he received. Although Count 2 would not have been dismissed, section 654 would have barred separate punishment for the misdemeanors in Counts 2 and 3 because they were based on the same conduct. Moreover, at sentencing after trial, he could still make a *Romero* request.[7]

Finally, trial counsel's belief it was better to admit the strike allegations because he might face a less favorable judge after a trial may have been a relevant consideration, but under the circumstances, it does not represent a sound and informed reason to advise

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[7] Concerning Newton's use of an expert to support his petition, the Attorney General asserts that "courts in California, as well as other jurisdictions, have not looked favorably upon testimony from such [experts]." However, the only California state court opinion cited is *In re Scott* (2003) 29 Cal.4th 783, and it does not support the Attorney General's opinion. In that case, a referee was appointed to resolve certain specific factual questions that did not involve the standard of care or whether trial counsel's performance was deficient. Accordingly, the referee excluded testimony from the defendant's expert on those subjects. The California Supreme Court upheld that ruling because the testimony was irrelevant. In doing so, however, the court observed, "It is true that referees have sometimes heard and considered expert legal testimony, but in those cases the testimony came within the scope of our questions. [Citations.] Because of the nature of the contentions, we do not require, and did not ask for, such testimony in this case." (*Id*. at pp. 818-819; see also, e.g., *People v. Frierson* (1979) 25 Cal.3d 142, 159-160 [declarations of experienced attorneys regarding proper standards for investigation and presentation of defenses]; *People v. Sanders* (1990) 221 Cal.App.3d 350, 365, 390 [attorney expert on standards of professional competence].)

We do not detect any antipathy in the *Scott* court's comments toward the use of legal experts in connection with claims of ineffective assistance of counsel.

Newton to abandon a defense to one of the strike allegations. This is especially so in light of the fact that trial counsel has provided no reason to think that the current judge would have been more favorable other than his own vague and general understanding that that judge had a "good reputation" with the defense bar.[8]

Under the circumstance, we conclude that advising Newton to admit the strike allegation was not a sound or reasonably informed trial strategy, and, therefore, Newton has made a prima facie showing that defense counsel "failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope*, *supra*, 23 Cal.3d at p. 425.)

The Attorney General claims as a matter of law, the victim of vehicular manslaughter cannot be an accomplice because under section 1111, an accomplice is one "liable to prosecution for the identical offense charged against the defendant on trial . . . ."[9] Applying this definition, he argues that even where a passenger aids and abets reckless drunk driving, if the passenger is killed, he or she cannot be prosecuted for vehicular manslaughter because (1) a deceased person cannot be prosecuted; and (2) causing one's own death is not a crime. For this reason, the Attorney General argues that counsel had no legal basis to contest the strike allegation, and his failure to do so was reasonable.

Trial counsel's declaration establishes that he did not rely, or even consider, this theory in advising Newton to admit the strike allegation. Indeed, he does not explain the

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[8] As it turned out, the allegedly more "favorable" judge denied the *Romero* request.

[9] Section 1111 provides, "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

analytical basis for his belief that there was no factual or legal defense to the strike allegation. And he admits he did not realize there was a possible defense until appellate counsel informed him.

In any event, we note that at the time defendant entered his plea, the issue of whether a victim of vehicular manslaughter, as a matter of law, couldt be deemed an accomplice for the purpose of determining whether that crime is a strike had not been decided, and there is still no precedent addressing that issue, let alone a case reaching the conclusion advocated by the Attorney General. Under the circumstances, therefore, we focus on the state of the law on the issue when counsel rendered his advice and determine whether it so supported the Attorney General's position that it was reasonable for counsel to advise Newton to admit the strike allegation.

In support of his claim that a victim of vehicular manslaughter cannot be an accomplice, the Attorney General cites *People v. Tobias* (2001) 25 Cal.4th 327 and *In re Meagan R.* (1996) 42 Cal.App.4th 17, which were decided before Newton entered his plea. In *Tobias*, the court held that the testimony of a minor victim of incest was not subject to the requirement of accomplice corroboration (§ 1111) because, as a victim, she could not be held culpable as a perpetrator for aiding and abetting the crime. (*People v. Tobias, supra*, 25 Cal.4th at pp. 332-333.) In *In re Meagan R.*, the court similarly held that a minor could not be guilty of burglary based on the theory that she entered a residence with the intent to participate in statutory rape because a minor victim of that crime cannot aid and abet its commission. (*In re Meagan R., supra*, 42 Cal.App.4th at pp. 24-27.) Both cases reflect a well-settled policy that even if a minor voluntarily consents to and participates in incest or sexual intercourse, the minor nevertheless is considered a victim of the offense and because of that status should not be prosecuted for it as an aider and abettor.

The Attorney General also cites *People v. Antick* (1975) 15 Cal.3d 79, overruled on other grounds in *People v. McCoy* (2001) 25 Cal.4th 1111, at page 1123, which was

also decided before defendant entered his plea. In *Antick*, the defendant and a man named Bose committed a burglary and escaped. Sometime later, police found Bose, who initiated a gun battle with them and was killed. The defendant was convicted of first degree murder based on Bose's death. In rejecting the claim that the defendant could be convicted based on the theory that he was vicariously liable for the consequences of Bose's unlawful gunfight with the police, the California Supreme Court explained that although Bose may have started the gun battle, his conduct did not result in the death of another person. Thus, since Bose could not be prosecuted for homicide based on his own death, the defendant could not be vicariously liable for his death. (*People v. Antick, supra,* 15 Cal.3d at p. 91.)

These cases arguably would have been relevant in determining whether to contest Newton's strike allegation because they involved situations where a victim was not an accomplice to a crime committed against him or her. However, those cases did not involve the determination of whether a particular crime was a strike; nor did the courts address whether the victim of vehicular manslaughter could be deemed an accomplice. " 'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.' " (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) Moreover, because the circumstances of those cases differ so much from the circumstances in Newton's case, those cases do not represent a compelling analytical basis to conclude that a vehicular manslaughter victim should not be deemed an accomplice.

Ironically, however, in addition to these cases, the Attorney General acknowledges a case that provides compelling support for the opposite conclusion—i.e., that such a victim *may* be deemed an accomplice. The Attorney General cites, without discussion, *People v. Flores* (2005) 129 Cal.App.4th 174 (*Flores*), which was also decided before Newton entered his plea. Because it is more pertinent than the Attorney General's other cases, we discuss it at greater length.

Flores involved the application of on enhancement under section 12022.53, subdivision (d) that applies to a defendant who is convicted of a specified felony and who, during its commission, personally fired a gun and caused the death of a person "other than an accomplice . . . ." (§ 12022.53, subd. (d).)[10] There, the defendant and his friend, Valdivia, were assaulting a rival gang member, when the defendant fired at the rival but hit and killed Valdivia. The defendant was convicted of murdering Valdivia, and based on the jury's additional finding on a section 12022.53 enhancement allegation, the court imposed the enhancement. (*Flores*, *supra*, 129 Cal.App.4th at pp. 178-181.)

On appeal, the defendant claimed, and the Attorney General conceded, that the court's instruction on the enhancement allegation erroneously omitted the "other than an accomplice" language of the statute. Nevertheless, the Attorney General argued that the accomplice exception was inapplicable: Valdivia could not be deemed an accomplice because, unlike the defendant, he could not be prosecuted for his own murder. (*Flores, supra,* 129 Cal.App.4th at p. 181.)

In rejecting this argument, the court noted that the accomplice exception reflected an intent to treat those who kill nonaccomplices more harshly than those who kill accomplices. However, under the Attorney General's analysis, when a defendant fires a gun during a specified felony and kills another person, the enhancement would apply regardless of whether the person killed was an accomplice or not. Thus, the Attorney General's analysis would, in effect, eliminate the accomplice exception. To avoid such a result and give meaning to the statutory language, the court held that in determining whether the exception applied to the murder charge against the defendant, the "relevant

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[10] Section 12022.53, subdivision (d) provides, in relevant part, "Notwithstanding any other provision of law, any person who, in the commission of a [specified] felony, personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment of in the state prison for 25 years to life."

question must be whether Valdivia was an accomplice *to the intended crime*, the natural and probable consequence of which was the intentional discharge of a firearm resulting in his own death. Here, the jury found defendant guilty of a conspiracy to commit a battery on [the rival]. 'Each member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design.' [Citations.]" (*Flores, supra*, 129 Cal.App.4th at p. 182, first italics added.)

With this in mind, the court observed that there was evidence to support a finding that Valdivia conspired with the defendant to attack the rival, and firing the gun that killed Valdivia was a natural and probable consequence of that conspiracy. Thus, Valdivia's status as a coconspirator would make him an accomplice to the intended offense of battery, which resulted in his own murder. (*People v. Flores, supra*, 129 Cal.App.4th at pp. 182-183.) Under the circumstances, the court concluded that the instructional omission was prejudicial and struck the enhancement. (*Id*. at p. 183.)

Flores shows that a person who is killed as a consequence of a certain crime can be considered an accomplice of that crime even if that person could not be prosecuted directly for his or her own homicide. Moreover, the analysis in *Flores* would readily lend itself to application in determining whether a conviction for vehicular manslaughter is a strike. Both sections 12022.53 and 1192.8 (as well as section 1192.7, subdivision (c)(8)) contain the same language limiting their application to victims "other than an accomplice." Moreover, just as the section 12022.53 applies *only* if the defendant commits an underlying target offense, so too former section 192, subdivision (c)(3) applied to Newton only if he committed one of the specified target offenses and caused a death. (See fn. 4, ante.) Thus, *Flores* supports argument that where a passenger aids and abets the target offense and that offense results in his death and the driver's conviction for vehicular manslaughter, the victim can be deemed an accomplice, and the accomplice exception applies. Furthermore, one could argue that, as in *Flores*, the Attorney

General's position in this case would effectively eliminate the accomplice exception. Thus, for example, where a defendant was driving under the influence and killed a passenger, a conviction under former section 192, subdivision (c)(3) would be a strike regardless of whether the passenger poured drinks in the car for the driver or simply sat quietly in the back seat. Such a result, disregards the statutory distinction between those who injure nonaccomplices and those who injure accomplices and the implicit legislative determination that the former are more culpable than the latter and therefore deserve harsher punishment.

Our discussion of the authorities cited by the Attorney General confirms our view that counsel's advice and failure to contest the strike allegation fell below an objective standard of reasonableness.

At the time of the plea, whether the victim of vehicular manslaughter could be deemed an accomplice for the purposes of determining whether the crime was a strike was an open question. The cases involving minor victims of incest and statutory rape and criminals whose own conduct leads to their own death do not preclude a finding that the victim of vehicular manslaughter could be deemed an accomplice; nor do they provide pertinent or compelling authority that Newton's vehicular manslaughter conviction was a strike offense. Thus, those cases would not have posed a substantial legal obstacle to successfully contesting the strike allegation.

On the other hand, at the time of Newton's plea, *Flores, supra,* 129 Cal.App.4th 174 provided a much stronger analytical basis to argue that a vehicular manslaughter victim can be deemed an accomplice. Furthermore, the record in this case contained no more evidence that the victim was not an accomplice than there was in *People v. Henley, supra,* 72 Cal.App.4th 555, where the court found the evidence insufficient to establish that fact beyond a reasonable doubt.

In short, given the available case law and the fact that the critical issue was an open question, we do not believe that reasonably competent counsel would have

abandoned a defense to the strike allegation and advised Newton to admit the allegation on the theory that the victim, as a matter of law, could not be deemed an accomplice.

The Attorney General alternatively claims that even if the victim of the vehicular manslaughter could be deemed an accomplice, the record would not support such a finding. The Attorney General argues that Perrault's statements in the probation report and later at a sentencing hearing do not establish that the victim contributed to his own death. He also notes the probation officer's comment in the probation report that there is no proof to substantiate Perrault's suggestion that the victim's behavior may have contributed to the accident.

The Attorney General's argument suggests that Newton had some burden to prove that the victim was an accomplice. However, it was the prosecution's burden to prove beyond a reasonable doubt that the victim was *not* an accomplice. Thus, it is irrelevant whether Perrault's statements, even if they were admissible hearsay, would support a finding that the victim was an accomplice. Moreover, the probation officer's statement that there is no evidence to substantiate Perrault's assertions about the victim's behavior are hearsay and not admissible to satisfy the prosecution's burden. Over and above the simple fact that Newton was the driver and the victim was a passenger, the Attorney General cites no admissible evidence to support a finding beyond a reasonable doubt that the victim was not an accomplice.

Prima Facie Showing of Prejudice

As noted, Newton declares, in essence, if he had been aware that there was a strong defense to one of the strike allegations, which, if successful, would have substantially reduced the potential maximum length of his sentence, he would not have followed trial counsel's advice and admitted that allegation, even if that meant going to trial on the underlying charges and other strike allegation.

The declarations of appellate counsel and Mr. Schwartz and our own analysis confirm that Newton had a reasonable legal and factual basis to contest the strike allegation, which renders Newton's declaration credible.

As noted, to establish prejudice from counsel's advice concerning whether to accept a negotiated settlement and enter a plea of guilty or no contest, the defendant must show a reasonable probability that but for counsel's deficient assistance, he "would not have pleaded guilty and would have insisted on proceeding to trial. [Citation.]" (*In re Alvernaz, supra,* 2 Cal.4th at p. 934; *Hill v. Lockhart, supra*, at p. 59; *In re Resendiz, supra,* 25 Cal.4th at p. 253.)

VI. DISPOSITION

The Director of the Department of Corrections & Rehabilitation is ordered to show cause before the Santa Clara County Superior Court, when the matter is placed on calendar , why petitioner is not entitled to the relief requested. The return shall be filed no later than 30 days from the date of this order

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.